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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRY LEE KELLER,

Defendant and Appellant.

H034392

(Santa Clara County  
Super. Ct. No. CC809682)

**I. INTRODUCTION**

After entering into a plea agreement, defendant Terry Lee Keller pleaded no contest to two felony counts, vandalism (Pen. Code, § 594, subd. (a), (b)(1))<sup>1</sup> and dissuading or attempting to dissuade a witness by force (§ 136.1, subd. (c)(1), as well as two misdemeanor counts, malicious damage to a wireless device (§ 591.5) and giving a false identity to a peace officer (§ 148.9). Defendant also admitted the allegations that he had one prior serious or violent felony conviction within the meaning of the Three Strikes law (§§ 667, subd. (b)-(i); 1170.12, subd. (c)) and had served four prior prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to a total term of six years in the state prison after reducing the vandalism charge to a misdemeanor. The trial court also ordered defendant to pay victim restitution in the amount of \$600 for the replacement value of the victim's cell phone.

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<sup>1</sup> All further statutory references are to the Penal Code.

On appeal, defendant challenges the order of victim restitution. He argues that the amount awarded exceeds the replacement value of the victim's cell phone and the trial court violated his due process rights by failing to require proof of replacement value beyond a reasonable doubt. For the reasons stated below, we disagree and therefore we will affirm the judgment.

## **II. FACTUAL BACKGROUND**

Our summary of the facts underlying the convictions is drawn from the transcript of the January 13, 2009 preliminary hearing and the probation report since defendant entered pleas of no contest.

On June 22, 2008, police officers from the Santa Clara Police Department responded to a 911 call from Bruce Ganey, the owner of the Trio Foods store. When the officers arrived, Ganey reported that he had been involved in a heated argument with a customer, Willie Grimes, who wanted either free items or to "start a tab." When Ganey refused, Grimes became belligerent. Ganey then told Grimes and the three men who were with him, including defendant, to leave the store, but Grimes remained and continued to yell at Ganey, who attempted to call 911. At that time, defendant returned to the store and overheard Ganey calling 911 on his Bluetooth headset. Defendant grabbed Ganey's cell phone, which was sitting on the store counter, and threw the phone across the store, causing it to shatter. Afterwards, defendant told Ganey, " '[I]f you call the cops, we'll be back in 30 minutes to fuck up your store.' "

The police officers subsequently viewed the Trio Foods' store video of the incident, which showed defendant's participation. After searching the area around the store, the officers found defendant, who gave his name as "Terry Lee Keller." The officers later determined that defendant's true last name was Hunt and that defendant had also given an incorrect date of birth.

Ganey told the police officers that the value of the cell phone destroyed by defendant was \$600 and provided documentation showing the cost of the phone.

### III. PROCEDURAL BACKGROUND

The first amended felony complaint filed on June 30, 2008, charged defendant with two felonies, vandalism (§ 594, subd. (a), (b)(1); count 1) and dissuading or attempting to dissuade a witness by force (§ 136.1, subd. (c)(1); count 2), and two misdemeanor counts, malicious damage to a wireless device (§ 591.5; count 3) and giving a false identity to a peace officer (§ 148.9; count 4). The complaint also alleged that defendant had one prior serious or violent felony conviction within the meaning of the Three Strikes law (§§ 667, subd. (b)-(i); 1170.12, subd. (c)) and had served four prior prison terms (§ 667.5, subd. (b)). After a preliminary hearing, defendant was held to answer on all counts.

Defendant subsequently entered into a plea agreement in which he agreed to plead no contest to all of the charges and prior conviction allegations in exchange for the People seeking a sentence of no more than six years. At the sentencing hearing held on June 19, 2009, defendant pleaded no contest in accordance with the plea agreement. Defendant also brought a motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), requesting the trial court to dismiss the prior strike allegation in the interests of justice, and a motion under section 17, subdivision (b)(5), requesting the trial court to exercise its discretion to reduce count 1, vandalism (§ 594, subd. (a), (b)(1)), to a misdemeanor.

Defendant's motion to reduce count 1 to a misdemeanor was supported by evidence regarding the value of the victim's cell phone, which consisted of copies of website pages indicating the pricing options for replacing the phone. Defendant's evidence showed that a cell phone with the same make and model number could be purchased online on October 6, 2008, for \$349.99. Defendant's evidence also showed that as of March 2, 2009, a used cell phone with the same make and model number as the victim's phone could be purchased on eBay for \$89.99, while the average "used price" was \$70.34. The People's opposition to the motion included evidence, consisting of a

customer receipt, which showed that the victim purchased his cell phone on May 8, 2006, for \$499.99 (\$599.99 less a \$100 discount), with additional charges for add-ons or peripherals and a warranty that brought the total cost of the new cell phone to \$721.72.

The trial court denied the *Romero* motion and granted the motion to reduce count 1 to a misdemeanor. Thereafter, the trial court imposed a sentence of six years in the state prison and ordered defendant to pay victim restitution to Bruce Ganey in the amount of \$600, plus a \$1,200 restitution fine (§1202.4), and a \$1,200 parole revocation restitution fine (§ 1202.45), which the court suspended. After the trial court ordered victim restitution in the amount of \$600, defense counsel requested that the trial court take into consideration the evidence regarding the value of the cell phone attached to defendant's section 17, subdivision (b)(5) motion in lieu of a holding a restitution hearing. The court responded that it had considered those documents and had determined that "[i]n this case we have an actual receipt from the victim, Mr. [Ganey], and as between those two data I found the receipt to be more persuasive as to what Mr. [Ganey] actually paid at the time."

#### **IV. DISCUSSION**

On appeal, defendant argues that the trial court abused its discretion in ordering payment of victim restitution in the amount of \$600 because the evidence showed that the victim could be made whole by awarding him \$70.34, which is the average used price for the victim's cell phone. Defendant also contends that his due process rights under the United States Constitution were violated because the trial court did not require the replacement value of the cell phone to be proved beyond a reasonable doubt. We will begin our analysis by reviewing the constitutional and statutory mandates for victim restitution.

##### ***A. Victim Restitution***

California voters passed Proposition 8, the initiative also known as the Victims' Bill of Rights, in 1982. (*People v. Giordano* (2007) 42 Cal.4th 644, 652 (*Giordano*).

“Proposition 8 established the right of crime victims to receive restitution directly ‘from the persons convicted of the crimes for losses they suffer.’ (Cal. Const., art. I, § 28, subd. (b).” (*Ibid.*) The California Constitution currently states, “It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer. [¶] Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.” (Cal. Const., art I, § 28, subd. (b)(13)(A) & (B).)

“The Legislature has enacted a statutory scheme that implements the broad mandate of article I, section 28, subdivision (b).” (*Giordano, supra*, 42 Cal.4th at p. 656.) Victim restitution is governed by section 1202.4, which provides in pertinent part (with exceptions not relevant here), that “in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require the defendant make restitution to the victim or victims in an amount established by court order, based upon the amount of loss claimed by the victim or victims or any other showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.” (§ 1202.4, subd. (f).)

The procedure for determining the appropriate amount of victim restitution is set forth in section 1202.4: “To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as a result of the defendant’s criminal conduct, including, but not limited to, all of the following: [¶] Full or partial repayment for the value of stolen or damaged property. The value of stolen or damaged property shall be

the replacement cost of like property, or the actual cost of repairing the property when repair is possible.” (§ 1202.4, subd.(f)(3)(A).)

We review the trial court’s order of victim restitution for abuse of discretion. (*Giordano, supra*, 42 Cal.4th at p. 663.) “The abuse of discretion standard is ‘deferential,’ but it ‘is not empty.’ [Citation.]” (*Ibid.*) “‘[I]t asks in substance whether the ruling in question “falls outside the bounds of reason” under the applicable law and the relevant facts [citations.]’ [Citation.] Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the surviving victim’s economic loss.” (*Id.* at pp. 663-664.)

Relying on *People v. Thygesen* (1999) 69 Cal.App.4th 988 (*Thygesen*), defendant contends that the trial court abused its discretion in ordering him to pay victim restitution of \$600 because that amount constitutes an improper windfall. According to defendant, his evidence showed that the victim could be made whole by awarding restitution in the amount of \$70.34, “the value of a used phone of the same type and model as the one it replaced.” He asserts that the trial court’s award of \$600 exceeds the bounds of reason because the award exceeds, not only the cost of a used replacement phone, but also the \$399.99 cost of a new replacement phone and the \$499.99 original purchase price of the victim’s phone.

Section 1202.4, subdivision (f)(3)(A), provides that “[t]he value of . . . damaged property shall be the replacement cost of like property . . . .” We find, however, that an award of victim restitution in the amount of \$70.34 for purchase from eBay of a used replacement phone of unknown condition, without any of the add-ons, peripherals or warranty included in the victim’s original cell phone purchase, is not required under the relevant authorities.

The California Supreme Court has stated that a trial court properly requires the “defendant to make restitution of the *full amount of the losses* determined to have been

caused by the crimes to which he pled guilty . . . .” (*People v. Birkett* (1999) 21 Cal.4th 226, 247, italics added.) Moreover, it is well established that the victim’s statement as to the original cost of a stolen or damaged item is “competent evidence of replacement cost and sufficient to support a restitution award.” (*People v. Tabb* (2009) 170 Cal.App.4th 1142, 1154; *People v. Foster* (1993) 14 Cal.App.4th 939, 946; *People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.) The trial court may therefore “accept a property owner’s statement made in a probation report about the value of stolen or damaged property as prima facie evidence of loss. [Citation.] ‘Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant’s criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim.’ [Citation].” (*People v. Tabb, supra*, 170 Cal.App.4th at p. 1154.)

In the present case, the People made a prima facie showing that victim Ganey’s economic loss was \$600, because Ganey told the investigating police officers that he purchased his cell phone for \$600, as reflected in the probation report and the police officer’s testimony at the preliminary hearing. The People also provided the trial court with a customer receipt indicating that Ganey had purchased his cell phone for \$499.99, with additional charges for add-ons or peripherals and a warranty that brought the total cost of the phone to \$721.72. Defendant has not disproved this evidence of Ganey’s economic loss resulting from defendant’s destruction of the cell phone.

Moreover, defendant’s showing of lower replacement costs for the cell phone does not require an award of victim restitution in an amount less than \$600. “ ‘If the circumstances reasonably justify the [trial court’s] findings,’ the judgment may not be overturned when the circumstances might also reasonably support a contrary finding. [Citation.] We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact. [Citations.]” *People v. Baker* (2005) 126 Cal.App.4th 463, 469.) In the present case, we determine that the trial court’s award of victim restitution in the amount of \$600 was

rational and supported by sufficient evidence, and consequently well within the court's discretion.

The decision in *Thygesen* does not convince us otherwise. In that case, the victim sought restitution for the defendant's theft of a cement mixer. (*Thygesen, supra*, 69 Cal.App.4th at p. 991.) The appellate court reversed the restitution award, stating that the purpose of victim restitution "is to make the victim whole, not to give a windfall. [The victim] is not entitled to replace a used mixer with a brand new one at appellant's expense, absent some extraordinary facts." (*Id.* at p. 995.) However, the parties in *Thygesen* failed to provide the trial court with any documentation from which the trial court could either determine the replacement cost of the cement mixer or calculate the amount to award for loss of use, and the appellate court therefore concluded that "there was absolutely no evidence presented to the trial court from which a rational determination as to either type of loss could have been made." (*Ibid.*)

The present case is factually distinguishable from *Thygesen*. Here, as we have discussed, the People presented evidence to the trial court from which the court could rationally determine that Ganey's economic loss as a result of defendant's destruction of the cell phone was \$600. Our determination is also consistent with the California Supreme Court's opinion in *Giordano* emphasizing that section 1202.4, subdivision (f) "requires that restitution 'be based on the loss claimed by the victim or victims or any other showing to the court . . .'" (*Giordano, supra*, 42 Cal.4th at p. 667.)

We therefore conclude that the trial court's order of victim restitution in the amount of \$600 does not constitute an abuse of discretion.

### **B. Due Process**

Defendant also contends, relying on *Giordano*, that the trial court's award of victim restitution violates the due process clause of the United States Constitution. (U.S. Const., 5th & 14th Amendments.)



In *Giordano*, the California Supreme Court noted that “numerous courts have held that restitution hearings require fewer due process protections than civil hearings or criminal hearings of guilt. [Citations.] Courts have premised this conclusion on the understanding that restitution hearings are sentencing hearings. [Citations.]” (*Giordano, supra*, 42 Cal.4th at p. 662, fn. 6.) Thus, it is the well established rule that “[t]he scope of a criminal defendant’s due process rights at a hearing to determine the amount of restitution is very limited: ‘A defendant’s due process rights are protected when the probation report gives notice of the amount of restitution claimed . . . , and the defendant has an opportunity to challenge the figures in the probation report at the sentencing hearing.’” [Citations.]” (*People v. Cain* (2000) 82 Cal.App.4th 81, 86; *People v. Prosser* (2007) 157 Cal.App.4th 682, 692.) Additionally, it is well established that the burden of proof at a restitution hearing is preponderance of the evidence. (*People v. Gemelli, supra*, 161 Cal.App.4th at p. 1542; *People v. Baker, supra*, 126 Cal.App.4th at p. 469.)

Defendant does not contend that he failed to receive notice of the amount of restitution claimed or that he was deprived of an opportunity to challenge the claimed amount. Instead, he complains that his due process rights were violated because the trial court did not require the People to prove the amount of the victim’s economic loss under a higher standard of proof: beyond a reasonable doubt. Defendant relies on the statement in *Giordano* that the numerous decisions holding that that restitution hearings require fewer due process protections “were decided prior to the high court’s decision in *Cunningham v. California* (2007) 549 U.S. 270 [*Cunningham*], and our decisions in *People v. Black* (2007) 41 Cal.4th 799 and *People v. Sandoval* (2007) 41 Cal.4th 825, which required ‘that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.’ [Citations.] Because defendant has not raised any due process or other state or federal constitutional challenge,

however, we do not have occasion to address possible constitutional challenges to restitution hearings.” (*Giordano, supra*, 42 Cal.4th at p. 662, fn. 6.)

While defendant acknowledges that the above statement is dicta, because the California Supreme Court did not reach any constitutional issues in *Giordano*, he claims that the rule in *Cunningham* applies in the present case. According to defendant, victim restitution constitutes punishment and exposes the defendant to a greater potential sentence. Defendant therefore asserts that the trial court was required to determine whether the People had proved the replacement value of the victim’s cell phone beyond a reasonable doubt. Since there is reasonable doubt, in defendant’s view, as to whether the replacement value of the cell phone was actually \$600, defendant contends that the order of victim restitution must be reversed.

We note that defendant did not object at the restitution hearing that he had been denied his due process rights under *Cunningham*. However, to the extent defendant’s due process claim may be considered a claim that the trial court exceeded its authority under section 1202.4, subdivision (f), we find that defendant’s failure to object did not result in forfeiture of the issue because the claim falls within the “ ‘unauthorized sentence’ ” exception to the general rule that failure to raise an issue in the trial court results in forfeiture of the issue on appeal. (See *People v. Slattery* (2008) 167 Cal.App.4th 1091, 1095.) We will therefore consider the merits of defendant’s due process claim.

We are not convinced that the rule in *Cunningham* is applicable under the circumstances of the present case, where defendant was not exposed to a potentially greater sentence as a result of the claim for victim restitution. Since the trial court determined the amount of victim restitution *after* imposing the sentence to which the defendant agreed as part of the plea agreement, there is no possibility that the determination of victim restitution exposed the defendant to a sentence greater than the maximum contemplated by the plea agreement. (See *People v. Millard* (2009) 175 Cal.App.4th 7, 36.)

We also find no *Cunningham* violation in the restitution proceedings below for another reason. The Supreme Court's decision in *Cunningham* was based upon its earlier decision in *Blakely v. Washington* (2004) 542 U.S. 296, where the high court ruled that “ ‘[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ ” (*Id.* at pp. 301, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) Because section 1202.4, the California statute governing victim restitution, does not prescribe a statutory maximum, we believe that the claim for victim restitution may be proved under the previously established preponderance of the evidence standard.

Finally, we disagree with defendant's contention that the People's failure to address his due process claim on appeal constitutes their concession that the issue has merit. It is well established that the respondent's failure to address contentions made in the appellant's opening brief does not concede those contentions. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 227.)

For these reasons, we conclude that defendant's due process claim lacks merit because it is undisputed that he received the required due process in victim restitution proceedings, including notice of the victim restitution claim and the opportunity to challenge the amount claimed in the trial court. (*People v. Prosser, supra*, 157 Cal.App.4th at p. 692.)

## V. DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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DUFFY, J.